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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35652

DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH, KATHLEEN KELLEY, ANDREW WILKLUND, AND RICHARD KOSIBA—PETITION FOR DECLARATORY ORDER

Digest:[1] This decision finds that certain operations conducted at a bulk transloading facility in the Town of Upton, Mass. constitute "transportation by rail carrier" and that, therefore, federal preemption applies to those operations.

Decided: December 4, 2014

By petition for declaratory order filed on August 1, 2012, seven residents of the town of Upton, Mass. (Town)—Diana Del Grosso, Ray Smith, Joseph Hatch, Cheryl Hatch, Kathleen Kelley, Andrew Wilklund, and Richard Kosiba (Petitioners)—request that the Board find that the Town's local zoning laws and other regulations are not preempted with respect to certain activities performed at a bulk transloading facility (the Upton Facility) located in the Town. The activities are performed by a third-party transloader, Grafton Upton Railcare, LLC (GU Railcare),[2] on property owned by Upton Development Group, LLC (UDG). GU Railcare asserts that it performs these operations on behalf of the Grafton & Upton Railroad Company (G&U). Petitioners allege that the wood pellet packaging services provided at the facility are not integrally related to rail transportation, and that the bulk transfer terminal activities are not being conducted by a rail carrier. We find that federal preemption applies to these activities as performed by GU Railcare.

BACKGROUND

G&U reports that it was incorporated in 1873 and has been in continuous operation since that time. G&U states that its line extends approximately 16.5 miles between North Grafton, Mass., where it connects and interchanges with CSX Transportation, Inc. (CSX), and Milford,

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] GU Railcare is a newly formed affiliate of a family of companies involved in the transportation of bulk commodities and related services conducted on behalf of its principal, Ronald Dana.

Mass., where it also connects with a line of CSX. UDG owns approximately 33 acres of property that are immediately adjacent to the original G&U yard in Upton. In July 2008, UDG entered into a long-term lease of the property to G&U, which included an option to purchase. The lease affords G&U the right to use the property for rail transportation purposes and to make investments and improvements for rail operations at its discretion. With its acquisition and control of the property through the lease and option to purchase, G&U states that it developed a plan for expanding its existing yard by improving the property and turning it into a larger rail-to-truck transload facility. As a result, a number of yard tracks that accommodate railcars handling bulk materials (both dry and liquid) were constructed, as well as a wood pellet transloading facility that could receive wood pellets shipped in bulk in hopper cars. G&U states that it has exercised its option to purchase the property, but has not yet elected to close on the purchase transaction because certain environmental remediation work required of UDG by the Massachusetts Department of Environmental Protection (MDEP) has not yet been completed.

On August 1, 2012, Petitioners filed the instant petition for declaratory order requesting that the Board find that certain operations conducted by GU Railcare at the transload facility are not part of G&U's rail transportation and therefore not subject to federal preemption.[3] G&U filed a reply in opposition to the petition on August 21, 2012, asserting that there is no controversy or dispute to be resolved, that preemption applies here, and that there is no need to institute a declaratory order proceeding. On January 24, 2013, the Board instituted a declaratory order proceeding (pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721) and established a procedural schedule.[4]

Petitioners argue that preemption does not apply here because the transloading services provided at the Upton Facility are neither integrally related to transportation, nor performed by, or under the auspices of, a "rail carrier." G&U responds that GU Railcare is providing transportation-related services at the Upton Facility on the railroad's behalf and the Town's zoning and other regulations are therefore preempted.[5]

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[3] Petitioners also sought discovery to obtain, among other things, the contractual agreements G&U has with its customers and any other documents that would help to ascertain the degree of control G&U has over the transloader performing services at the Upton Facility.

[4] The January 24th decision denied requests the parties had made for discovery, pointing out that Petitioners had access to the documents underlying the transaction. On February 13, 2013, Petitioners filed a petition for reconsideration of that determination, which the Board denied in a decision served on May 8, 2013.

[5] Letters supporting G&U's position were filed by the American Short Line and Regional Railroad Association (ASLRRA), Frank S. DeMasi, and Massachusetts State Representative George N. Peterson, Jr. Letters supporting Petitioners' actions here were filed by Massachusetts State Senator Michael O. Moore and the Citizens of Upton (Citizens). Although these filings were not timely filed, we will accept them in the interest of compiling a more complete record. See City of Alexandria, Va.—Petition for Declaratory Order, FD 35157, slip

(continued…)

PRELIMINARY MATTERS

Motion to Dismiss the Petition. G&U argues that this petition for declaratory order should be dismissed for two reasons.[6] First, G&U argues that Petitioners lack standing because they fail to provide factual support for the allegation that they have been aggrieved. Petitioners respond that they have, in fact, alleged specific injury as a result of operations conducted at the Upton Facility, including such problems as glare, light intrusion, noise, dust, diminution of property values, and truck noise.

The Board is not bound by the strict requirements of standing that govern judicial proceedings. See James Riffin—Petition for Declaratory Order, FD 34501 (STB served Feb. 23, 2005). Petitioners are Town residents located near the bulk transloading facility and have an interest in understanding whether state and local or federal laws govern. Accordingly, G&U's motion to dismiss for lack of standing is denied.

G&U also argues that the petition for declaratory order should be dismissed because Petitioners failed to exhaust potential administrative remedies under Massachusetts law involving zoning and land use before coming to the Board. Petitioners respond that they are not required to exhaust such state law remedies, citing 49 C.F.R. § 1117.1 (a "party seeking relief not provided for in any other rule may file a petition for such relief"). We agree. G&U cites no statutory provision or Board regulation requiring a party to exhaust state law remedies before seeking a declaratory order from the Board. Moreover, the courts have held that the Board's view of the reach of federal preemption under 49 U.S.C. § 10501(b)—the issue Petitioners raise here—is entitled to great weight because the agency is interpreting the scope of its governing statute and addressing issues involving interstate commerce. See Green Mountain R.R. v. Vermont (Green Mountain), 404 F.3d 638, 642-43 (2d Cir. 2005) (citing CSX Transp., Inc. v.

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op. at 2 (STB served Nov. 6, 2008) (allowing reply to reply "(i)n the interest of compiling a full record"); Denver & Rio Grande Ry. Historical Found.—Petition for Declaratory Order, FD 35496, slip op. at 3 (STB served Feb. 23, 2012). We will also reject Petitioners' claim that ASLRRA needed to file a petition to intervene, as the Board specifically sought comments from all interested parties in its January 24, 2013 Decision.

[6] On August 21, 2012, a motion to dismiss was filed on behalf of GU Railcare; Dana Transport, Inc.; Dana Rail Care; Liquid Transport Company; International Equipment Leasing, Inc.; and Suttles Truck Leasing, LLC (herein collectively referred to as the Dana Companies). (According to the Dana Companies, Dana Rail Care is not a separate legal entity; rather, it is a trade name of Dana Container, Inc. (DCI).) In light of our disposition set forth below—which finds that GU Railcare is performing transportation-related activities on behalf of G&U, and which does not order any of these entities to do or refrain from doing anything—we need not reach the issues raised in this motion to dismiss.

Ga. Pub. Serv. Comm'n, 944 F. Supp. 1573, 1584 (N.D. Ga. 1996) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 496 (1996))). In any event, issues involving the federal preemption provision contained in 49 U.S.C. § 10501(b) can be decided by the Board or the courts in the first instance. See 14500 Ltd. LLC—Pet. for Declaratory Order, FD 35788 (STB served June 5, 2014) (citing Mid-America Locomotive & Car Repair, Inc.—Pet. for Declaratory Order, FD 34599, slip op. at 3 (STB served June 6, 2005)). Accordingly, G&U's motion to dismiss for failure to exhaust administrative remedies is denied.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See InterCity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Authority—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (1989). In this case, Petitioners ask that the Board resolve the uncertainty regarding the scope of the Board's jurisdiction over the Upton Facility's operations. We find it appropriate for the Board to issue a declaratory order addressing the preemption issues presented here.

The federal preemption provision contained in § 10501(b) bars the application of most state and local laws to railroad operations that are subject to the Board's jurisdiction. Section 10501(b) expressly provides that the "jurisdiction of the Board over . . . transportation by rail carriers . . . is exclusive." Section 10501(b) also explicitly states that "the remedies provided under [49 U.S.C. §§ 10101-11908] are exclusive and preempt the remedies provided under Federal or State law."[7]

Because the Board has jurisdiction over "transportation by rail carrier," 49 U.S.C. § 10501(a), to be subject to the Board's jurisdiction and qualify for federal preemption under § 10501(b), the activities at issue must be "transportation," and must be performed by, or under the auspices of, a "rail carrier."[8] The term "transportation" is defined expansively to include "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail," and "services related to that movement, including receipt, delivery," "transfer in

[7] Even where § 10501(b) preemption applies, there are limits to its scope. Overlapping federal statutes are to be harmonized with each statute given effect to the extent possible. Moreover, states retain police powers to protect the public health and safety on railroad property so long as state and local regulation do not unreasonably interfere with interstate commerce. See Green Mountain, 404 F.3d at 643.

[8] See Hi Tech Trans, LLC—Petition for Declaratory Order—Newark, N.J. (Hi Tech), FD 34192 (Sub-No. 1), slip op. at 5 (STB served Aug. 14, 2003). A "rail carrier" is defined as "a person providing common carrier railroad transportation for compensation . . . ." 49 U.S.C. § 10102(5).

transit," "storage," and "handling" of property. 49 U.S.C. § 10102(9). Whether a particular activity constitutes transportation by rail carrier under § 10501(b) is a case-by-case, fact-specific determination.

The Board's jurisdiction extends to the rail-related activities that take place at transloading facilities if the activities are performed by a rail carrier, or the rail carrier holds out its own service through a third party that acts as the rail carrier's agent, or the rail carrier exerts control over the third-party's operations.[9] Based on the record in this case, including the affidavits and documents contained in the parties' submissions, we conclude that GU Railcare is performing transportation-related activities on behalf of G&U at the Upton Facility. Therefore, these activities qualify for federal preemption under § 10501(b). Our analysis follows.

Activities Conducted at the Upton Facility. As noted, the term "transportation" is broadly defined in the Interstate Commerce Act to encompass the facilities used for and services related to the movement of property by rail, expressly including receipt, delivery, transfer in transit, storage, and handling of property. 49 U.S.C. § 10102(9). Citing this language, the Board has explained that, generally, "intermodal transloading operations . . . are part of rail transportation that would come within the Board's jurisdiction." New England Transrail—Construction, Acquis. & Operation Exemption—in Wilmington & Woburn, Mass. (NE Transrail), FD 34797, slip op. at 6 (STB served July 10, 2007). The Board has distinguished these types of loading and unloading operations from "manufacturing and commercial transactions that occur on the property owned by a railroad that are not part of or integral to the provision of rail service," which are not embraced within the term "transportation." Id. at 10. Activities constitute manufacturing or commercial transactions if they change the nature or

[9] Compare Green Mountain, 404 F.3d at 640, 642 (transloading and temporary storage of bulk salt, cement, and non-bulk foods by a rail carrier qualified for preemption); Lone Star Steel Co. v. McGee, 380 F.2d 640, 647 (5th Cir. 1967) (An agent undertaking the obligations of a common carrier (i.e. performing services as part of the total rail service contracted for by a member of the public) also holds itself out to the public as being a common carrier by rail, and is therefore subject to federal regulation); and Ass'n of P&C Dock Longshoremen v. Pittsburgh & Conneaut Dock Co., 8 I.C.C. 2d 280, 290-95 (1992) (so long as the questioned service is part of the total rail common carrier service that is publicly offered, then the agent providing it for the offering railroad is deemed to hold itself out to the public) with Town of Milford, Mass.—Petition for Declaratory Order (Town of Milford), FD 34444, slip op. at 3-4 (STB served Aug. 12, 2004) (Board lacked jurisdiction over noncarrier operating a rail yard where it transloaded steel pursuant to an agreement with the carrier, but the transloading services were not being offered as part of common carrier services offered to the public); Hi Tech, slip op. at 5-7 (no STB jurisdiction over truck-to-truck transloading prior to commodities being delivered to rail); and Town of Babylon & Pinelawn Cemetery—Petition for Declaratory Order (Town of Babylon), FD 35057, slip op. at 5-6 (STB served Feb. 1, 2008) (Board lacked jurisdiction over activities of a noncarrier transloader offering its own services to customers directly).

physical composition of the commodity being transported. See Town of Milford, slip op. at 1-2 (cutting and welding of steel not transportation).

An activity may be "integrally related" to rail transportation if it facilitates rail transportation even if it is not absolutely essential for the cargo to be transported by rail. Thus, in NE Transrail, the Board found that baling and wrapping of municipal solid waste (MSW) at a truck-to-rail transloading facility was integrally related to rail transportation even though some MSW arrived at the facility in intermodal containers and some arrived pre-baled. NE Transrail, slip op. at 13-14. The process of wrapping and baling, the Board explained, allowed a wider variety of rail cars to be used. Id. at 14. On the other hand, the Board found that another activity performed at the same facility—the shredding of construction and demolition (C&D) debris—was not integrally related to rail transportation because it was done for the purpose of extracting valuable materials that the railroad could resell. Id. at 14-15.

Here, the parties dispute whether the vacuuming, screening, bagging, and palletizing of wood pellets at the Upton Facility is more like the baling and wrapping of MSW or the shredding of C&D debris that occurred in NE Transrail. We find that these activities are akin to the baling and wrapping of MSW. Although not essential to transporting wood pellets by rail, performing these activities at the Upton Facility facilitates rail transportation by making it more efficient. As G&U explains, the activities performed at the Upton Facility allow the wood pellets to be transported in hopper cars, which can accommodate about 20 more tons of pellets than the boxcars that otherwise would be used. G&U Reply, V.S. Moffett 3-4. Were these activities performed at the manufacturing facility, the wood pellets would have to be transported in boxcars, in which case each pallet containing 50 40-pound bags would have to be blocked and braced in order to limit movement within the boxcar. The blocking and bracing materials would consume space and weigh about 4,000 pounds per boxcar, leaving less capacity for the wood pellets themselves. Id.

Petitioners argue that the screening, vacuuming, and bagging of the wood pellets are like the shredding operation in NE Transrail in that they change nature of the product by converting it from a mass of bulk wood pellets that cannot be sold to consumers to a bagged product that is consumer and retailer friendly. Petition 14-15. The critical point for the Board's analysis, however, is that the activities are "integrally-related" to transportation. As noted above, the activities at the Upton Facility facilitate the movement of wood pellets by rail and do not change them into another product. The pellets are packaged differently, as was the MSW in NE Transrail, but the pellets themselves are not changed—in contrast, for example, to shredding the product at issue, or cutting and welding it (as in Town of Milford).

Petitioners argue that the wood pellets are not bagged to facilitate their movement by rail, as the pellets can be bagged either before or after rail movement. Petition 14. Instead, they argue, the wood pellets are bagged so the consumer can carry them from the store to the car, from the car to the house, protect them while stored at the house, and load them into the stove. Id. Although the bagging of the pellets may produce some value to the consumer, G&U has

demonstrated that bagging them at the Upton Facility facilitates rail transportation by permitting a more efficient use of hopper cars. For that reason, the bagging of the pellets qualifies as a service "related to" the movement of property by rail. NE Transrail, slip op. at 14.[10]

Petitioners argue that the activities at the Upton Facility constitute manufacturing because one of the wood pellet manufacturers describes these types of activities on its website as part of its manufacturing process. Petition 16. We do not find this dispositive, however, as the record also contains a verified statement from another manufacturer stating that the manufacturing process is "fully completed" prior to shipment by rail in hopper cars. G&U Reply, V.S. Middleton 3. Moreover, as discussed earlier, even if the process at the Upton Facility also benefits the product's end user, G&U has demonstrated that it allows for far more efficient rail transportation.

Based on the record viewed as a whole, we conclude that the activities at the Upton Facility constitute services related to the movement of property by rail and thus fall within the statutory definition of "transportation."

The Relationship between G&U and GU Railcare. Next, we must determine whether GU Railcare is performing transloading activities on behalf of G&U, which is a rail carrier. In conducting this analysis, the Board has typically considered the following: whether the rail carrier holds out transloading as part of its service; whether the rail carrier is contractually liable for damage to the shipment during loading or unloading; whether the rail carrier owns the transloading facility; whether the transloader invoices and collects the transloading fees and is compensated for its services by the carrier or the shipper; the degree of control retained by the rail carrier over the transloader; and other terms of the contract between the rail carrier and the transloader. See City of Alexandria, Va.—Petition for Declaratory Order (City of Alexandria), FD 35157, slip op. at 2-3 (STB served Feb. 17, 2009); accord Norfolk S. Ry. v. City of Alexandria, 608 F.3d 150 (4th Cir. 2010).

Petitioners assert that G&U does not hold out itself or GU Railcare as its transloading contractor in marketing the Upton Facility, but rather holds out Dana Transport (another of the Dana Companies) as providing transloading and additional services at the facility. Petitioners allege that it is GU Railcare, rather than G&U, that establishes the transloading rates for services performed at the Upton Facility. Further, Petitioners allege that the Terminal Transloading Agreement (Agreement) between G&U and GU Railcare includes authorization for GU Railcare to develop, as its own customers, G&U customers that tender traffic at the Upton Facility.

[10] In NE Transrail the Board noted that "baling and wrapping [of MSW] are not the sort of activities that would have value for any . . . purpose" other than facilitating rail movement. NE Transrail, slip op. at 14. The Board, however, did not make the absence of any incidental value a prerequisite to finding an activity related to the movement of property by rail.

Petitioners argue that G&U and GU Railcare have the same type of relationship as existed between the New York and Atlantic Railway Company (NYAR) and Coastal Distribution L.L.C. (Coastal) in Town of Babylon, which the Board concluded was insufficient to trigger preemption. There, according to Petitioners, the railroad was simply the "shipper" that Coastal used in its waste disposal business. Here, Petitioners assert that G&U is being used in much the same way by the Dana Companies (i.e., GU Railcare) to facilitate their trucking and other businesses.

In reply, Respondents state that GU Railcare is operating on behalf of G&U and that GU Railcare's operations are, and have been marketed as, an integral part of the transportation performed by G&U, which is a licensed rail carrier. G&U states that it constructed the tracks and transloading facility and is responsible for maintenance of the tracks and switches. G&U claims that the parties' Agreement supports its interpretation because here, as in City of Alexandria, the Agreement provides that G&U will hold itself out to the public as a common carrier by rail, offering to provide linehaul transportation, transloading, storage, and other specified transportation services with respect to bulk commodities and other commodities; G&U has the right to cancel the Agreement, for any reason, on short notice; GU Railcare will, as directed or requested by G&U, perform all activities required to transload commodities from rail cars to trucks at the terminal; GU Railcare pays no rent or other fees to the rail carrier for use of the facility and is strictly prohibited from using the facility for any purposes or activities other than transloading for customers of G&U and from conducting any independent business there for its own account; GU Railcare does not coordinate transloading services for a shipper, but, rather, a shipper must contact G&U's marketing department to arrange for terminal services; and GU Railcare's sole compensation is derived from its transloading services.[11]

Based on the Agreement and other record evidence, we find that GU Railcare is acting on behalf of G&U. This case differs significantly from Town of Babylon. In that proceeding, the entity performing the transloading built the facility and, under its agreement with the railroad, assumed responsibility for all track repairs and for all necessary repairs, maintenance, and upkeep of the facility. The transloader was also entitled to charge a loading fee for its transloading services—a fee in addition to the rail freight transportation charge payable to the railroad and over which the railroad had no control. And for use of the facility, the transloader paid the railroad a usage fee for every loaded railcar (inbound or outbound). Moreover, the transloader was permitted to enter into separate disposal agreements in its own name with customers for disposition of commodities after transportation, from which the railroad disclaimed any liability.

[11] G&U also points out that its Tariff 5000-A states that the Upton Facility is operated by G&U through a "subcontract" with GU Railcare, the terminal operator, and that GU Railcare will perform the terminal services for, and under the auspices of, G&U.

Here, in contrast, and similar to the facts presented in City of Alexandria, the record demonstrates that G&U constructed the tracks and transloading facility and is responsible for maintenance of the tracks and switches. G&U also offers and markets transloading services as part of its total transportation package. G&U Reply, V.S. Delli Priscoli 4. Further, GU Railcare is prohibited from using the facility for any purpose or activity other than transloading for customers of G&U and cannot conduct any independent business there for its own account. Additionally, GU Railcare's sole compensation is derived from its transloading services. Id., V.S. Gordon 4. Finally, GU Railcare pays no rent or other fees to the rail carrier for use of the facility. G&U Supp. Reply, V.S. Gordon 2. All of these factors support the conclusion that GU Railcare is acting on G&U's behalf.

Petitioners correctly note that the billing, payment, and compensation procedures implemented here differ from those in City of Alexandria in that GU Railcare invoices and collects charges from customers (which, according to GU Railcare, is done on behalf of G&U), and GU Railcare's sole compensation for its transloading services performed at the Upton Facility is the amounts invoiced and collected by it. Moreover, it is GU Railcare, and not G&U, that establishes the transloading rates for services performed at the Upton Facility. But G&U explains that GU Railcare bills and collects transloading fees from customers because the railroad lacks the necessary personnel. G&U adds that GU Railcare acts only on its behalf and that rates for transloading are established by G&U in its tariff so that any decision to adjust the rates is ultimately made by the railroad.

Typically, billing, payment, and compensation arrangements are not handled by the transloader, but rather by the rail carrier. See, e.g., City of Alexandria. Here, however, the record demonstrates that G&U has ultimate control over its billing, payment, and compensation arrangements. Further, G&U has overall control of its pricing, as the transloading rates charged to shippers are established by G&U in its tariff and any decision to adjust a rate is ultimately made by the railroad.

Petitioners also argue that, instead of G&U performing the transloading through GU Railcare, it is actually Dana Transport that conducts the transloading, and that Dana Transport is directly offering these services to customers. Petitioners rely on a reference from the G&U website which states that the Upton Facility "'benefits from the on-site [third-party logistics] trucking and transload services of industry-respected provider Dana Transport.'" Petition 21 (quoting Exhibit 22)). There is abundant evidence in the record that Dana Transport provides trucking and other third-party logistics services to shippers at the Upton Facility. But the fact that Dana Transport provides these services does not resolve the issue before us—whether or not Dana Transport (rather than GU Railcare) provides transloading services. Based on our consideration of all of the record evidence, we are satisfied that this single, undated website reference to Dana Transport providing transload services does not overcome the other evidence, much of it sworn, establishing that GU Railcare—and only GU Railcare—is currently performing transloading at the Upton Facility, and that it is doing so on behalf of G&U. See, e.g., G&U Reply in Opposition to Petition, V.S. Dana 2 ("All of the freight is transloaded by GU

Railcare.") & 5 ("Other than the transloading services being performed by GU Railcare, no Dana Companies are performing rail car services . . . at the Upton railyard."); id., V.S. Polselli ("GU Railcare is responsible for performing all transload services to or from rail cars moved to or from the Upton railyard."); G&U Reply to Petition to Supplement the Reply Pursuant to 49 C.F.R.§ 1117.1, V.S. Polselli ("[A]ll of the transloading at the Upton rail yard is handled by GU Railcare as the agent for G&U. No other Dana Company provides any transloading services at the G&U rail yard.").[12]

Petitioners next suggest that because G&U does not assume liability or responsibility for the transloading activities, they are not being conducted on G&U's behalf. Petition 25-26. In support, Petitioners point to G&U's 2011 Service Terms and Guidelines, which states that G&U's "liability for loss or damage to property or delay in transfer or shipment shall be that of a warehouseman only." Petition, Exhibit 25 at 110. G&U's attempt to limit its liability to its customers does not change the relationship between G&U and GU Railcare into something other than that of principal and agent. In any event, G&U abolished the 2011 Service Terms and Guidelines as of May 2012, and replaced them with a tariff, the current version of which omits this language. G&U Reply in Opposition to Petition 28 n.9.[13]

Petitioners also argue that the Agreement allows GU Railcare to develop, as its own customers, G&U customers that tender traffic at the Upton Facility. According to Petitioners, this provision is inconsistent with City of Alexandria where, in that case, the operator did not market, and had no right to market, the transload facility. Petitioners' Reply 8-9 (filed May 20, 2013). The provision in question provides:

> Contractor shall not use the Terminal other than for the purposes set forth in this Agreement, and shall not use the Terminal for purposes of engaging in any other activities or independent businesses for its own account. Contractor may solicit customers of Railway to use services provided by Contractor at the Terminal, including,

[12] The record also shows that another Dana Company (DCI) previously provided transloading services at the Upton Facility, but that it did so only temporarily and prior to the execution of the Agreement and the formation of GU Railcare. G&U's witnesses state that DCI provided these services on behalf of and under the control of G&U, that this transloading was performed on the basis of an informal understanding that formation of GU Railcare and the Agreement would soon be finalized, and that the work was performed in a manner that was consistent with the terms and conditions of the Agreement as executed. G&U Supp. Reply 17-18, Supp. V.S. Delli Priscoli 3-4, Supp. V.S. Dana 2-3. Petitioners present nothing that contradicts this testimony. Thus, this evidence does not demonstrate that GU Railcare is not now providing transloading services as the agent of G&U.

[13] Petitioners do not dispute that a new tariff has superseded the 2011 Terms and Guidelines nor do they explain why the old tariff is relevant. See Petitioners' Reply 4-6 (filed May 20, 2013).

> but not limited to, bagging pellets at the packaging facility located at the Terminal, but such services may be provided only after or before such customer ships a Commodity by rail over the line of Railway.

Agreement § 1.C. Thus the Agreement does not permit GU Railcare to develop G&U customers as its own customers. Indeed, the first sentence quoted above specifically prohibits such conduct. To the extent GU Railcare does any marketing, it will do so on behalf of G&U.

Finally, Petitioners argue that certain actions by Dana Companies other than GU Railcare show that the transloading activities at the Upton Facility are not being performed under the auspices of a rail carrier.[14] However, the relevant issue with regard to whether preemption applies to the activities of GU Railcare is whether GU Railcare's transloading activities are part of rail transportation. Therefore, we will not address Petitioners' argument with respect to the alleged activities by other companies that are not part of GU Railcare's transloading activities.

Based on all of the information provided by the parties, including the rights and obligations set forth in the Agreement, we find that GU Railcare's transloading activities at the Upton Facility are sufficiently under the control of G&U to make them part of G&U's rail transportation. Consequently, we conclude that GU Railcare is performing transportation activities at the Upton Facility on G&U's behalf and that, therefore, federal preemption applies here.

GU Railcare is not a sham. Citing GWI Switching Services, L.P.—Operation Exemption—Lines of Southern Pacific Transportation Co. (GWI Switching Services), FD 32481 (STB served Aug. 7, 2001), Petitioners argue that the formation of GU Railcare is a sham. Specifically, Petitioners question whether GU Railcare was established for "legitimate and substantial business reasons,"[15] suggesting that it was set up solely to qualify the transloading services for preemption and to avoid local regulation. According to Petitioners, because the Dana Companies had transloading expertise and a presence at the Upton Facility prior to GU Railcare's formation, there was no reason to establish a new transloading company. Petitioners further claim that GU Railcare is not sufficiently independent of the other Dana Companies to warrant a finding that GU Railcare is actually performing the activities at the Upton Facility.

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[14] Petition 20-25. Specifically, Petitioners state that: (1) one of the pellet manufacturers allegedly has entered into a "partnership" with one of the Dana Companies; (2) trucks owned by one of the Dana Companies are loaded with pellets for shipment to their final destination; (3) some of the Dana Companies allegedly store their trucks at the Facility, and "it is probable that the Dana Companies are paying a fee for storage at the Upton Facility"; and (4) some Dana Companies provide non-transload services at the Facility and thus likely have entered into contractual relationships with the users of those services. Id.

[15] Petitioners' "Reply to Reply" 12.

G&U responds that it is permissible to structure a transloading arrangement to meet the preemption standards established by the Board and the courts. Moreover, according to G&U, the real issue here is not whether G&U is sufficiently independent from the other Dana Companies but, rather, whether GU Railcare is sufficiently independent from shippers and receivers at the Upton Facility. See City of Alexandria. In that regard, G&U states that there is no relationship between GU Railcare and any customers using the transloading services, and that none of the Dana Companies is a shipper, receiver, or owner of freight transloaded at the Upton Facility.

Based on the record before us, we reject Petitioners' argument that GU Railcare is a sham. A rail carrier that chooses to provide transloading services may perform them itself, or it may engage another party to perform them on its behalf. G&U has pursued the latter option. In this case, we conclude that G&U and GU Railcare are parties to a transloading agreement that is consistent with Board preemption precedent.[16] The fact that the parties appear to have modeled their relationship on the one approved in City of Alexandria does not support a finding that GU Railcare is a sham. Nor does the mere creation of GU Railcare, when other Dana Companies already had prior transloading experience, indicate subterfuge.[17]

On March 27, 2014, Petitioners filed a supplemental pleading in support of their allegations that GU Railcare is a sham. Petitioners state that they have recently gained access to new, critical information that is relevant to this proceeding. They allege that, on December 18, 2013, a reported spill of 100 gallons of liquid styrene, a hazardous material, occurred at the Upton Facility, as indicated on a MDEP Release Log Form. Petitioners claim that the spill occurred during rail-to-truck transloading operations and involved a Dana Company road tanker vehicle. As pertinent here, Petitioners also claim that documents prepared by MDEP and Clean Harbors Environmental Services (Clean Harbors) identified a Dana Company, DCI, as the responsible party and operator. Petitioners contend that these documents make clear that GU Railcare is set up solely to obtain preemption for ongoing, independent Dana corporate family operations at the Upton Facility.

In an April 16, 2014, response, G&U states that employees of GU Railcare were transloading styrene from rail-to-truck when a GU Railcare pump malfunctioned. G&U adds

[16] GWI Switching Services, cited by Petitioners, does not support their position. That case involved a noncarrier subsidiary seeking an exemption to become a carrier, and one key issue was whether labor protection (among other things) would apply on the basis that the noncarrier was sufficiently independent of its parent and carrier affiliates. Here, that labor protection issue is not present, and that case is not otherwise relevant to the facts presented in this proceeding.

[17] Ronald Dana, the owner of the various Dana Companies, states that it has been his "practice to have different companies for different types of operations and locations. This serves to help insulate existing successful businesses from the risks of new business." G&U Supp. Reply, Supp. V.S. Dana 2.

that GU Railcare's terminal manager, Michael Polselli, promptly called MDEP and the Upton Fire Department to report the incident and shortly thereafter contacted Clean Harbors to conduct the necessary cleanup and remediation.[18] G&U notes that, on the day of the spill, an MDEP representative issued a Notice of Responsibility correctly listing G&U as the responsible party. See G&U Reply to Petition to Supplement the Reply Pursuant to 49 C.F.R. § 1117.1, V.S. Delli Priscoli Exhibit A.

G&U acknowledges that some (but not all) subsequent documents related to the spill referred to DCI as the responsible party, but argues that those references were merely clerical errors that probably resulted from confusion during the emergency and from Clean Harbors' past invoicing practices with other Dana Companies. Id. at 4. In a verified statement, Mr. Polselli states that, when he contacted Clean Harbors to arrange for the cleanup, he indicated that he was calling on behalf of G&U. Id., V.S. Polselli 3. Mr. Polselli's claim is consistent with MDEP's Release Log Form, which lists G&U as the reporting organization, and specifically states that Mr. Polselli called "representing the Grafton and Upton Railroad." Petition to Supp. the Reply Pursuant to 49 C.F.R. § 1117.1, Exhibit 1 at 2. Nevertheless, Mr. Polselli says, Clean Harbors treated his call as being made on behalf of Suttles Truck Leasing, one of the Dana Companies.[19] Clean Harbors, however, determined that the cost of performing the remediation work would exceed the credit limit of Suttles Truck Leasing, and unilaterally picked DCI, another Dana Company, with which it had worked elsewhere, as its "customer" because DCI had sufficiently high credit limits to satisfy Clean Harbors that it could provide emergency services on credit. Without consulting Mr. Polselli about the proper entity for which the work was being performed, Clean Harbors then drafted various documents either on behalf of DCI or listing DCI as the responsible party, actions to which Mr. Polselli did not object because he was focused on getting the spill cleaned up quickly and properly. G&U Reply to Petition to Supplement the Reply Pursuant to 49 C.F.R. § 1117.1, V.S. Polselli 3-5.

G&U admits that these errors should have been corrected sooner, but argues that they were inadvertent and did not affect the substance of its relationship with GU Railcare. Lastly,

[18] The fact that Mr. Polselli serves both as regional manager of DCI and terminal manager of GU Railcare is not an indicator that G&U lacks sufficient control over the transloading operations conducted at the Upton Facility. See, e.g., Iowa, Chi. & E. R.R.—Acquis. & Operation Exemption—Lines of I&M Rail Link, LLC, FD 34117, slip op. at 11 (STB served July 22, 2002) (shared management is common among affiliated carriers and does not detract from their financial and operational independence).

[19] Mr. Polselli suggests that Clean Harbors may have done this because GU Railcare had never previously had a spill at the Upton Facility, whereas Mr. Polselli had previously worked with Clean Harbors regarding a matter related to a small spill by Suttles Truck Leasing at another facility.

G&U states that the errors have subsequently been reported to MDEP and Clean Harbors and have been corrected. Petitioners have not disputed G&U's explanation.

After reviewing Petitioners' supplement and G&U's reply, we find G&U's explanation of events credible and, accordingly, that the references to DCI as the responsible party were errors. The record, viewed as a whole, demonstrates that GU Railcare, and not DCI, is performing transloading activities at the Upton Facility, and that GU Railcare is doing so on G&U's behalf. Accordingly, we reject Petitioners' allegations that the G&U-GU Railcare relationship is a sham.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. G&U's request to dismiss the petition on grounds of standing and failure to exhaust state administrative remedies is denied.

2. The Board accepts into the record all of the late-filed letters submitted by interested parties.

3. The petition for declaratory order is granted to the extent discussed above.

4. This proceeding is discontinued.

5. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.